United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1394

T-6433

B P/S

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Respondent,

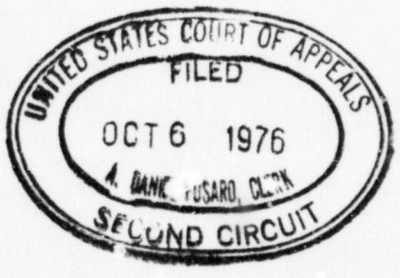
vs.

FLORIAN KAZMIERCZAK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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PRELIMINARY STATEMENT

Florian Kazmierczak was tried before the Honorable John T. Curtin, with a jury on a three-count indictment charging income tax evasion for the years 1966, 1967 and 1968 (6-9)*. On February 19, 1976, the jury returned a verdict acquitting him for the year 1966 and finding Mr. Kazmierczak guilty as charged for the years 1967 and 1968 (275).

By his order and decision dated July 2, 1976, Judge Curtin denied Mr. Kazmierczak's post verdict motions for a judgment of acquittal or in the alternative for a new trial (277-287).

On August 11, 1976, Mr. Kazmierczak was sentenced to pay a $1,000 fine which was to run concurrently (288). Thereafter, on August 20, 1976, a Notice of Appeal was duly filed and this Court ordered Mr. Kazmierczak's brief and appendix to be filed by October 7, 1976.

* All references are to pages of the Appendix unless otherwise indicated.

STATUTE INVOLVED

Section 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain a conviction.

2. Whether Mr. Kazmierczak was improperly foreclosed in cross-examining Agent Pasquarella and substantially prejudiced by the Court's comments concerning the cross-examination.

3. Whether Mr. Kazmierczak was substantially prejudiced and deprived of a fair trial by the Government's closing remarks.

4. Whether the Court erred in its charge on consistent underreporting.

STATEMENT OF FACTS

Florian Kazmierczak is the owner-operator of a delicatessen located at 977 Sycamore Street, Buffalo, New York (293).

Before commencement of trial, a stipulation was agreed to which reflected that Mr. Kazmierczak had underpaid his income tax for 1966 by $1,427.84, for 1967 by $3,811.17 and for 1968 by $1,813.13 (291). It was also stipulated that Mr. Kazmierczak's education ended in the sixth grade, his mode of bookkeeping was simplified and that he cooperated fully with the Internal Revenue Service (293, 294).

Special Agent Michael Pasquarella testified that he was assigned to investigate Mr. Kazmierczak on September 19, 1969 (11). He said that his functions as a special agent included investigations concerning possible criminal violations of the Internal Revenue Law (11). Together with Revenue Agent Tony, who had conducted an audit of the Defendant, Pasquarella interviewed Mr. Kazmierczak on October 7 and 24, 1969 (12-13, 113). Agent Pasquarella stated that he informed the Defendant that it would be his job to determine if Mr. Kazmierczak wilfully understated his taxable income (13).

Pasquarella said he was told by the Defendant that Mr. Kazmierczak was the only person who made entries in the gross receipts and expense books, that Mr. Kazmierczak never charged a fee for check cashing and utility payments and that Mr. Kazmierczak personally prepared the form 941 quarterly payroll returns (19, 25, 27). Mr. Kazmierczak's income tax returns for

1966 and 1967 were prepared by M. Kuzczko, his return for 1968 was prepared by Joseph Ciapkcik, both preparers had died prior to trial (17).

According to Agent Pasquarella, the Defendant stated that he maintained $1,500.00 in a cash box which was kept in the rear of the store or in the Kazmierczak apartment (20). Pasquarella was told by the Defendant that the amount entered in the gross receipt book would be computed at the end of each day by counting the money in the cash register and subtracting the starting figure which represented cash present in the register at the beginning of a day and needed to make change (3). Mr. Kazmierczak was given an example of a $50.00 payroll check; according to Pasquarella, the Defendant said he would take the cash from the $1,500.00 cash on hand box and at the end of the day replenish the box with $50.00 from the cash register (30, 33; emphasis supplied).

Agent Pasquarella was told by Mr. Kazmierczak that he maintained a safe deposit box at the Marine Midland Trust Company. He requested permission to inventory the contents of that box (19, 35). Mr. Kazmierczak said he would call and schedule a time for entering the safe deposit box; Pasquarella said that Mr. Kazmierczak never called (35).

On cross-examination, Pasquarella said he had the ability to take affidavits and that he was sure he had the affidavit forms with him when he interviewed Mr. and Mrs. Kazmierczak (72). When asked whether he could have had the Kazmierczak's sign an affidavit, the Court intervened stating

that questions as to what Agent Pasquarella didn't do would not develop any useful information and defense counsel was instructed to "zero in" on what Pasquarella did do (72).

Agent Pasquarella testified on cross-examination that the memorandum of his interview with Mr. Kazmierczak didn't state what time of day the Defendant replenished the cash box from the cash register for checks cashed from the box (75). Pasquarella's memorandum didn't mention whether the cash box was replenished before or after Mr. Kazmierczak counted the money in the register (76, 77). Finally, Pasquarella conceded he never asked Mr. Kazmierczak what time of day the $1,500.00 cash box was replenished and that if the replenishment occurred prior to counting the money in the register then the amount recorded as gross sales would have been less (84, 113).

On cross-examination, Agent Pasquarella reiterated that the purpose for his investigation was to determine wilfulness (86, 87). Defense counsel queried

> ". . . you knew it (wilfulness) would have to be something that was unjustifiable, without excuse, stubbornly and ostinately and perversely made?" (87)

The Court interjected

> "Wait a minute. That is a question of law. Disregard the question. That is not a correct statement of the law." (87)

Then the following dialogue ensued between the Court and defense counsel (87, 88):

Mr. Condon: "Forgive me, Your Honor, I apologize."

The Court: "Can we get to the facts, Mr. Condon? A lot of this you know and I believe, and I am going to state it direct, bluntly and candidly, it is window dressing. Mr. Pasquarella has conducted an investigation and you are entitled to question him about what he did and you have, but as far as all these adjectives and so forth, it does not help us."

Mr. Condon: "Your Honor, most respectfully, I think. . ."

The Court: "Mr. Condon, put a question. The last question does not help the inquiry whatever. Next question."

Mr. Condon: "I am just attempting to find out . . . "

The Court: "Next question."

On cross-examination, Pasquarella said that he checked past activity at Mr. Kazmierczak's safe deposit box to determine who had signed in or out but that he never tried to gain access to the box and never mentioned anything to Mr. Kazmierczak's attorney about getting into the box (89, 90, 91).

DOLORES TRAMONT

The Defendant's daughter, Dolores Tramont, was called and testified as Government witness. Mrs. Tramont stated that from 1966 through 1968 for a two or three week period usually in February, she would handle the cash box, pay the help, pay vendors and make out checks (118, 119). She testified that during these periods she cashed payroll checks and accepted utility payments, charging a ten cent fee for these services except in instances when the individual involved was a good customer (125,126). Mrs. Tramont said that her father told her to charge the fee (126). There was no evidence that Mr. Kazmierczak charged such a fee.

Mrs. Tramont said that she recorded daily gross receipts in a shorthand notebook which contained prior entries made by her father (126-129). She testified that previous entries might have occurred in one year and on re-direct she said it could have been more than once (162).

Mrs. Tramont explained that during 1966, 1967 and 1968 she did not make her entries in the regular gross receipts book because she believed the tax preparer had possession of this book at those times. She stated that she did record expenses in the expense book during those periods when she operated the store (129, 130). Mrs. Tramont said that sometime during 1966 through 1968, she saw a book like the gross receipts book, with the same size pages but a different cover (158, 159).

On cross-examination, Mrs. Tramont said that there was no tape

was something "unjustifiable, without excuse, stubbornly and obstinately and

in the cash register but that each sale was recorded on a spindle of numbers (143). Initially, Mrs. Tramont said that total sales were ascertained from the row of numbers; but later she stated that sales were always gleaned from a count of the money in the register. Mrs. Tramont conceded that the numbers were not checked by her on every occasion (143, 144). Later, Mrs. Tramont said that a cash count was the only record of money in the cash register with the exception of the manual spindles which she did not pay close attention to (153). Later, on cross-examination, Mrs. Tramont reiterated that the register had no tape and stated that the numbers on the register were not accurate (160).

Mrs. Tramont identified her parents income tax returns for 1966 through 1968 which indicated that they had been prepared and signed on February 5, 1967, January 31, 1968 and January 27, 1969, respectively (154-157).

GOVERNMENT SUMMATION

During summation, the United States Attorney, Roger Williams, claimed that Mrs. Tramont had testified that "many times" when using the stenographic notebook, she had seen entries of gross receipts which had previously been made by her father (179, 180). Mrs. Tramont in fact had testified that although she had seen prior entries in the shorthand notebook which had been made by her father, she did not recall seeing such entries in every year (128, 129). She also said that her father's entries may have occurred more than once (162).

Mr. Williams also told the jury that Agent Tony did not testify about Pasquarella's interviews with the Defendant because she wouldn't have added anything to the case different from Pasquarella's testimony as to what had occurred (239, 240).

THE COURT'S INSTRUCTION

The Court charged the jury on the question of willfulness and consistent underreporting in the following words:

> "This involves the specific intent to evade the tax and some willful commission or affirmative action by the defendant in furtherance of that intent such as, for example, a consistent pattern of understatement or income. The mere underreporting of income alone does not show willfulness, but if you find that over a period of years, there is a consistent underreporting, that may be evidence of the willfulness on the part of a defendant. This may include evidence of underreporting in prior years. You may acquit the defendant in one year, but you may consider the evidence in the following years if you find that it is pertinent to the issue." (259, 260)

> "As I have explained to you before, however, if you find a consistent pattern of underreporting then you can consider that as part of your determination of intent" (271).

The charge was excepted to by defense counsel (273).

POINT I

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION

A violation of Title 26 U. S. C. Section 7201 requires proof beyond a reasonable doubt that a substantial additional amount due, and that the Defendant willfully attempted to evade the additional tax with a specific intent to defraud the Government.

The Defense contends the Government failed to prove that Mr. Kazmierczak knew of a tax deficiency or that he acted willfully with a specific intent to evade the tax due.

As previously stated, the prosecution and defense stipulated to the amounts of tax owed during each of the indictable years.

Simply stated, the defense position is that the jury verdict was based upon the stipulation (289-296) and the Court's charge concerning a "consistent pattern of understatement" (259, 260, 271). The jury was instructed that it could acquit in one year and still consider the evidence concerning that year in its deliberations involving subsequent years. Most, if not all of the Government's evidence was restricted to the entire indictment period. Therefore, no other explanation of the verdict can account for the acquittal in 1966 and the convictions on subsequent years. We most respectfully submit that the understatement of income in more than one year cannot support these convictions.

The origin and universally cited source for the consistent under-reporting axiom is Holland v. United States, 348 US 121. Although a net worth case, Holland recognized this theory of prosecution equally applicable to bank deposit and cash expenditure litigation. In each instance the Government

> "asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of 'conduct, the likely effect of which would be to mislead or to conceal' Spies v. United States, 317 US 492, 499" (348 US at 125)

The Hollands were indicted for a three year period during which they reported $31,265.92 in taxable income while realizing a net worth increase of $113,185.32 (348 US at 130). It was also proven that the defendant-petitioners destroyed the cash register tapes from which their financial books were compiled and that they failed to record all of their income (348 US at 137).

The Court accepted the defense argument that willfulness "cannot be inferred from the mere understatement of income and that it involves a specific intent which must be proven by independent evidence" (348 US at 139). It went on to note that

> "[h]ere, however, there is evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners part to include all of their income in their books and records. Since, on proper submission the jury could have found that these acts supported an inference of willfulness their verdict

must stand" (78 US at 139; emphasis supplied).

Holland does not state that consistent underreporting alone is evidence from which willfulness may be inferred (Cf. Malone v. United States, 304 F 2d 878). Other acts of evasion were involved as was the understatement of large amounts of income. Here, the prosecution stipulated that Mr. Kazmierczak voluntarily furnished the Internal Revenue Service with the very materials used and relied upon in making the Government's computations. The Government never suggested that these voluntarily tendered materials were other than completely accurate.

A review of later cases referring to consistent underreporting reveals the existence of other factors evidencing willfulness. Here the Government cited United States v. Coblentz, 453 F 2d 503 for the proposition that a pattern of underreporting in prior years can be considered on the issue of willfulness (Excerpt, page 16).* In Coblentz, the Court found that the understatement . . .

> "represents a consistent pattern of not reporting large amounts of income which is itself evidence of willfulness" (453 F 2d at 505; citations omitted; emphasis supplied.)

While retaining part of the Holland rule requiring underreporting "large amounts," the Court in Coblentz did not adhere to the Holland require-

* Excerpt of proceedings on February 18, 1976: argument of Mr. Williams in support of his request to charge

ment that there be other acts of evasion. However, a close reading of Coblentz discloses the presence of such other acts.

Coblentz was an attorney indicted for income tax evasion for the years 1963 through 1965. During this period he reported taxable income of $30,351.09 when it should have been $109,017.42; the additional tax owed was $5,243.98 in 1963, $21,581.44 in 1964 and $13,686.61 in 1965 (453 F 2d at 505).

As noted by the Court, Coblentz' indictment and conviction stemmed from his unconventional mode of reporting legal fees on his tax returns (453 F 2d at 504). As a specialist in condemnation proceedings he would receive checks from the City of New York which were capable of being cashed up to five years from the date of issuance. Coblentz would retain these checks and present them subsequent to the year in which received. He would then report the money on his tax return in the year they were deposited or negotiated. Pursuant to State Appellate Division rules, he would file with the New York State Judicial Conference a closing statement reporting the fees within fifteen days of their receipt. The closing statements revealed the receipt of fees in excess of $75,000 over what was reported on Coblentz' tax returns.

The following factors, aside from underreporting, supported a finding of willfulness; Coblentz prepared and signed the closing statements thereby showing his knowledge of the unreported income received; he sup-

plied his accountant with the information to prepare his returns; he filed tax returns as an unmarried head of the household while married which resulted in a lower tax than if he had properly filed; he kept no books, records or check stubs (453 F 2d 505; see also United States v. Matthews, 335 F Supp 157).

In United States v. Berger, 325 F Supp 1297, the Court properly held that . . .

> "willfulness may not be inferred solely from proof of understated taxes. A specific intent to evade or defeat the tax must be proved by independent evidence of willful affirmative acts" (325 F Supp at 1303).

On appeal, this Court found that

> "[t]he Government's independent evidence of willful affirmative acts beyond its proof of understated taxes, included the following: (1) appellant directed Colonial's bookkeeper to remove Jamaica invoices in the amount of $50,000 to $75,000 each quarter for treatment as expenses on the books of Colonial; (2) he and only he received from the bookkeeper separate records which were kept of each false entry; (3) he concealed this procedure from all other top officers of Colonial, from Colonial's accountants and from its outside auditors"(United States v. Berger, 456 F 2d 1349, 1352; citation omitted.)

United States v. Slutsky, 487 F 2d 832, involved the prosecution of individuals who had understated income for a three year period in the amounts

of $399,177.21, $477,910.47 and $354,975.32 respectively (487 F 2d at 837). The Internal Revenue investigation exposed the existence of a savings account unreflected in the defendants business books from which $136,000 had been withdrawn (487 F 2d at 836).

In passing on the issue of willfulness, this Court proclaimed that

> "[i]t was further incumbent upon the Government to establish intent by evidence independent of the understatement of income. Holland v. United States, 348 US at 139." (487 F 2d at 844).

Aside from the amount and duration of underreporting, the evidence demonstrated that material information was withheld from defendant's own accountant as well as from an Internal Revenue agent and also the utilization of "unorthodox accounting practices, including parallel entries, with deceptive results" (487 F 2d at 844).

Annexed hereto is a chart comprised of cases where consistent underreporting occurred together with the additional acts of evasion found in each (Appendix A).

In attempting to ascertain the true scope of the Holland holding, due consideration of civil tax fraud cases is most illuminating. In McGee v. C. I. R., 519 F 2d 1121, the Fifth Circuit found that the Commissioner had met the burden of proving fraud without relying solely upon the taxpayer's failure to report income. The Court, in reviewing the acts of fraud involved,

aptly noted

> "[i]t is the combination of these indicia which we conclude warranted the inference of fraud. See Holland v. United States, 348 US 121, 139" (519 F 2d at 1126).

The Second Circuit holding in O'Connor v. C. I. R., 412 F 2d 304, is particularly pertinent. There the petitioner, a certified public accountant, underreported his income by $303,694.38 over a seven year period. The Court noted that

> "[s]uch a consistent and substantial understatement of income in strong evidence of fraud, when there is also evidence of the taxpayer's false statements, his attempt to conceal his assets and the nature of his transactions, and his incredibly casual and deceptive handling of his affairs, the trier of fact may properly conclude that the taxpayer has acted fraudulently with an intent to evade tax" (412 F 2d at 310; citations omitted; emphasis supplied).

In United States v. Mitchell, 271 F Supp 858, (aff'd. 413 F 2d 181), Judge Campbell stated

> "[t]hough consistent substantial understatement of income is highly persuasive evidence of intent to defraud, I do not believe that such understatement in and of itself is proof enough." (271 F Supp at 863)

The factual situation in Lee v. United States, 365 F Supp 389, a civil case, is remarkably similar to the instant case. There the taxpayers,

who each had no more than a sixth grade education, owned and operated a grocery store. They maintained a box separate from the cash register with which to cash customer checks, failed to accurately ascertain the daily gross receipts, adhered to a modest standard of living and voluntarily disclosed to the Internal Revenue Service the information used to compile the Government's computations.

The Lees understated income over a three year period by $12,577.17, $22,836.21 and $13,754.99. Noting the Commissioner's burden of proving fraud by "clear and convincing evidence" the Court, after considering the factors mentioned above, found for the taxpayers. The Lees had previously been acquitted of tax evasion charged in a criminal prosecution.

Holland and its progeny require proof of willfulness apart from income understatement. Permitting a jury to convict solely on the basis of such understatement even where it occurs more than once, dramatically reduces the Government's burden. In effect, it enables the prosecution to obtain a conviction by proving only that the taxpayer underreported income in more than one year.

The Government contended that there were other facts present which indicated a willful understatement of income. It was asserted the defendant maintained a double set of books (179-182).

Regarding a double set of books. Dolores Tramont stated that her

father made entries in a notebook and that this might have occurred more than once (162). From this fact alone, the jury was asked to infer that Mr. Kazmierczak kept a separate record of gross receipts which was different from the amounts reflected in the gross receipt book. No evidence was adduced as to the extent or dates of Defendant's notebook entries nor was Mrs. Tramont asked to compare her father's entries with those in the gross receipt book.

Keeping a double set of books was cited in Spies v. United States, 317 US 492, as conduct capable of supporting an inference of willfulness. In Spies, the instance of conduct from which willfulness could be inferred were proven by direct evidence. There, the petitioner conceded the existence of the conduct in arguing that the motive behind his actions was not the evasion of income tax. Here, there was no direct evidence of double books nor of any other conduct "the likely effect of which would be to mislead or to conceal" (Spies v. United States, 317 US 492, 499). Holland recognized the need for direct evidence of conduct which when coupled with understatement can support a finding of willfulness (348 US at 125).

As a final word on the issue of a "double set of books", we would suggest that the term refers to books containing similarly extensive information but reflecting grossly dissimilar amounts of income or expenditure. The concept of a "double set of books" as utilized in the context of proof of willful tax evasion appears to have no rational application to business records

which contain merely duplicate information. Since duplicate books can in no fashion advance a scheme to evade taxes, their existence can scarcely be deemed evidence of such a corrupt intent. The Government at trial made no attempt to demonstrate that the information contained in the notebook was dissimilar to the information contained in the gross receipts book.

POINT II

DEFENSE COUNSEL WAS IMPROPERLY FORECLOSED IN HIS CROSS-EXAMINATION OF AGENT PASQUARELLA AND DEFENDANT WAS SUBSTANTIALLY PREJUDICED BY THE COURTS COMMENTS CONCERNING THE CROSS-EXAMINATION

As previously stated, Mr. Pasquarella testified on direct examination that the purpose of his involvement in the case was to ascertain whether or not Mr. Kazmierczak willfully understated taxable income (13). Subsequent to an audit by Revenue Agent Tony, the matter had been referred to the Intelligence Division for investigation of possible criminal violations (13). Agent Pasquarella said he informed Mr. Kazmierczak about the nature of his investigation on October 7, 1969, prior to interviewing him (12-14).

When on cross-examination, Mr. Pasquarella was asked whether he could have taken an affidavit from the Defendant, defense counsel was instructed by the Court that inquiries concerning what Pasquarella didn't do were not pertinent. Defense counsel was directed to "zero in" on what Agent Pasquarella did do (72, emphasis supplied).

Later, in cross-examination on the issue of willfulness, the jury was admonished to disregard defense counsel's question and the Court once again directed that the inquiry be limited to what Mr. Pasquarella did as opposed to what he did not do (86-88).

Defense counsel's question concerning willfulness asserted that it

was something "unjustifiable, without excuse, stubbornly and obstinately and perversely made." The Court stated those adjectives were not a correct statement of the law and the question was not useful.

It should be noted that those very terms were used by the Supreme Court in United States v. Murdock, 290 US 389, 394. The Court there was called upon to define the word "willfully" when that term appears within the context of a criminal statute. Moreover, those words are quoted verbatim in the Internal Revenue Handbook for Special Agents (Section 31[11].2[b]).

Counsel submits that the Court erred in denying full and complete cross-examination about Agent Pasquarella's investigation and that the error was compounded by the Court's remark categorizing the defense inquiry as "window dressing." Being denied the opportunity of completely probing Agent Pasquarella's omissions as well as his commissions, the defense was precluded from adequately testing the quality of the investigation of Mr. Kazmierczak and the value of the conclusions reached as a result of that investigation. It should be remembered that Special Agent Pasquarella was scrutinizing a poorly educated, unsophisticated shopkeeper, whose mode of operation was extremely error prone. Defense counsel was prevented from ascertaining the degree of care, if any, employed by Mr. Pasquarella in eliminating innocent explanations of income understatement.

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is neces-

> sarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only be showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." (Alford v. United States, 282 US 687, 692; citations omitted)

Alford noted the instances where a court could properly limit cross-examination. They include protecting a witness from being discredited by virtue of his proper invocation of the privilege against self-incrimination and attempts to harass, annoy or humiliate the witness (282 US at 694).

This Court has held that where a witness on cross-examination asserts the self-incrimination privilege thereby precluding defense inquiry into the details of the witness' direct testimony, then the direct testimony should be stricken (United States v. Cardillo, 316 F 2d 606).

> "The Sixth Amendment right of confrontation requires appellate courts to reverse convictions where it appears

> that the cross-examination of government witnesses has been unreasonably limited" (United States v. Newman, 490 F 2d 139, 143).

Moreover,

> "[e]ven where it cannot be said that cross-examination was actually denied, the circumstances may be such as to indicate that the particular restriction in question constitute an abuse of discretion" (Harries v. United States, 350 F 2d 231, 236).

The remark about "window dressing," coming from the bench, improperly undermined the scope of cross-examination and was in effect an instruction bolstering the witness' testimony by telling the jury that whatever Pasquarella neglected to do was unimportant.

The probable impact of the "window dressing" remark is best delineated in United States v. Grunberger, 431 F 2d 1062, where this Court recognized that

> "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling. Moreover, instructions given in the charge to the jury that they are the sole judges of the credibility of witnesses cannot remove the impression so created" (431 F 2d at 1068; citations omitted).

POINT III

THE DEFENDANT WAS PREJUDICED AND DEPRIVED OF A FAIR TRIAL DUE TO REMARKS MADE BY THE GOVERNMENT'S ATTORNEY ON SUMMATION

In his closing argument to the jury, Assistant United States Attorney Roger Williams misstated a portion of the evidence and buttressed the testimony of Agent Pasquarella by claiming that Agent Tony would not have testified differently from Pasquarella.

Mr. Williams asked the jury to recall the testimony of Dolores Tramont that "many times she saw entries" in the notebook previously made by Mr. Kazmierczak (179, 180). In fact, Mrs. Tramont stated that the prior entries may have occurred more than once (162). This certainly doesn't constitute observing the entries "many times" and the Defendant was prejudiced by Mr. Williams' remark. This inaccurate comment on the evidence was an attempt to support the Government theory that a double set of books was maintained by Mr. Kazmierczak. As previously noted, the existence of double books can provide an inference of willfulness and the jury was so instructed (267). Clearly, Mr. Williams attempted to convey the specter of a prevalent course of conduct which was unsupported by the evidence.

Additionally, in rebutting the defense counsel's argument concerning Agent Tony's not testifying, Mr. Williams argued that she would have added nothing and that Agent Pasquarella's testimony about his interviews of Mr. Kazmierczak were correct (239, 240). Mr. Williams' statement was

the equivalent of offering facts not in evidence. His conduct amounted to testifying for Agent Tony and vouching for the credibility of Agent Pasquarella

> "when a prosecutor misstates facts in his closing remarks or states facts outside of the record in such a way as to prejudice a defendant, a new trial is required" (United States v. Newman, 490 F 2d 139, 147).

Prejudice depends not upon the persistency of error but on the probable impact as reflected in the jury's verdict. This is especially true in a close case such as this one.

> "We must point out, however, that where the Government's case involves close factual issues and its proof of an element of the crimes alleged leaves room for a reasonable inference inconsistent with guilt, we will scrutinize claimed error with particular care. Error which may be deemed relatively minor in other circumstances may reach prejudicial proportions in a close factual case such as this" (United States v. Grunberger, 431 F 2d 1062, 1066-1067).

POINT IV

THE COURT ERRED IN ITS CHARGE ON CONSISTENT UNDERREPORTING

The Court's charge concerning consistent underreporting is set forth in the "Statement of Facts." That instruction was erroneous as it failed to comport with the rule of law initially set forth in Holland v. United States, 348 US 121, 139. Moreover, the instruction failed to follow the language of United States v. Coblentz, 453 F 2d 503, which the Government relied upon as authority for its request to charge on consistent underreporting.

Coblentz, while improperly ignoring the Holland requirement that acts aside from consistent underreporting must be present, at least retained the Holland view that the underreporting must be of "large amounts" (453 F 2d at 505). The instruction here failed to mention the requisite other acts or large amounts of understatement and therefore was improper under either Holland or Coblentz.

A defense exception to the instruction was noted (273).

Regarding appellate review of trial errors, the Supreme Court has said

> "[t]hus it is not the appellate court's function to determine guilt or innocence . . . But this does not mean that the appellate court can escape altogether taking account

> of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is the guilt in law, established by the judgment of laymen. And the question is not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." (Kotteakos v. United States, 328 US 750, 763, 764).

As stated in Townsend v. Sain, 372 US 293, a new trial is required where the finder of fact has been guided by an erroneous standard of law (372 US at 315, note 10). Here, the verdict itself manifests the adherence by the jury to an incorrect instruction on consistent underreporting.

CONCLUSION

The Defendant is entitled to a reversal of his conviction and dismissal of the indictment because the evidence was insufficient to sustain a conviction.

In the alternative, the Defendant should be granted a new trial for the errors which occurred during the proceedings.

> "Errors of the trial court which may be prejudicial in a close criminal case, in the sense of being capable in such a situation of possibly affecting the result, can well be without any such rational possibility in a strong case, and this does not entitle the defendant to a reversal of his conviction. The reviewing court must, of course, be able to say with fair assurance that the errors complained of could not, with natural operation in the total setting and proceedings had, be regarded as having any influencing effect" (Homan v. United States, 279 F 2d 767).

It is respectfully submitted that United States v. Kazmierczak was indeed a close case, and that the errors reviewed in this memorandum most probably had a significant effect on the determination of the jury.

Respectfully submitted,

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JOSEPH M. LA TONA, on the Brief

CASE	DEFENDANT'S OCCUPATION	AMOUNT UNDER-REPORTED (BY YEARS)	TAX DEFICIENCY (BY YEARS)	ACTS OF EVASION
U.S. v. Pawlak 352 F Supp 794	Musician	$59,587 $57,294 $48,646 $13,963	$35,123 $30,283 $22,034 $ 5,680	False statements to Government agents; failure to provide ledger to revenue agent; defendant's admissions that he knowingly reported only income for which he had forms 1099 and W-2
U.S. v. House	Manufacturer	$48,790 $28,924 $76,176	$24,909 $14,176 $42,145	Customer checks not deposited in business bank account but were cashed elsewhere; defendant exhibited forged letter stating his bank records were destroyed in a flood; false statements that records destroyed by others; checks deposited subsequent to year when received.
U.S. v. Procario 356 F 2d 614 cert. den. 384 U.S. 1002	Physician	$12,102 $16,375 $15,269		Insistence on cash receipts even when patient wished to pay by check; withholding of full records from accountant.

CASE	DEFENDANT'S OCCUPATION	AMOUNT UNDER-REPORTED (BY YEARS)	TAX DEFICIENCY (BY YEARS)	ACTS OF EVASION
U.S. v. Nunan 236 F2d 576 cert. den. 353 U.S. 912	Attorney, former IRS Commissioner	$42,489 $19,503 $23,599 $17,818 $23,840	$33,079 $15,583 $14,641 $11,228 $16,553	Concealed legal fees from his law partners; complete absence of books, records, checkbooks or cancelled checks.

Affidavit of Service

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

October 4, 1976

Re: United States of America v Kazmierczak

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of
Condon, Klocke, Ange, Gervase & Sedita

Attorney(s) for
Appellant

On October 4, 1976
(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☒ Appendix
of the above entitled case addressed to:

RICHARD J. ARCARA, ESQ.
United States Attorney for the Western Dist.
of New York
68 Court St.
Buffalo, NY 14202

☐ [illegible] enclosed in a postpaid wrapper [illegible]

☐ By hand delivery

.....John D. Hay.....

Sworn to before me this 4th day of October 1976

.....Virginia A. Mahoney.....
~~Notary Public~~
Commissioner of Deeds